DATO' KANAGALINGAM VELUPPILLAI A

v.

THE ROYAL COMMISSION OF ENQUIRY ON THE VIDEO CLIP RECORDING OF IMAGES OF A PERSON PURPORTED TO BE AN ADVOCATE AND SOLICITOR SPEAKING ON THE TELEPHONE ON MATTERS REGARDING THE APPOINTMENT OF JUDGES & OTHER CASES B

HIGH COURT MALAYA, KUALA LUMPUR C
ABDUL KADIR MUSA J
[APPLICATION FOR JUDICIAL REVIEW NOS: R2-25-182-08, R2-25-183-08, R2-25-190-2008, R2-25-191-2008 & R2-25-192-2008]
12 DECEMBER 2008 D

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Locus standi - Whether Attorney-General has locus standi to oppose application for leave to apply for order of certiorari - Whether in public interest - Rules of the High Court 1980, O. 53 r. 3* E

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Whether only available for decisions - Whether available for findings or recommendations - Rules of the High Court 1980, O. 53 r. 3 - Courts of Judicature Act 1964, s. 25(2) & Schedule* F

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Whether findings of Royal Commission subject to certiorari - Whether findings are decisions within meaning of O. 53 r. 2(4) - Rules of the High Court 1980, O. 53 r. 2(4)* G

STATUTORY INTERPRETATION: *Foreign statutes - Use of foreign authorities - Whether permissible - Rules of the High Court 1980, O. 53 r. 2(4)*

On 12 December 2007, a Royal Commission of Enquiry ('Commission') was set up pursuant to s. 2 of the Commissions of Enquiry Act 1950 to investigate the authenticity of a video recording purportedly showing the first applicant speaking on the telephone to the fifth applicant about the appointment of judges and which implicated all the applicants in material particulars. The Commission's terms of reference were to: (1) ascertain the video recording's authenticity; (2) identify the speaker, the person spoken to and the persons mentioned; (3) ascertain the truth or H I

A otherwise of the content of the recorded conversation; (4) determine whether any act of misbehavior has been committed by person(s) identified or mentioned; and (5) recommend appropriate action to be taken against the person(s) identified or mentioned should such person(s) be found to have committed any
B misbehavior.

At the conclusion of the Commission's enquiry, it submitted a report of its findings ('report') to the King on 9 May 2008 and the report was made public on 20 May 2008. The Commission's
C findings were that: (1) the video recording was authentic; (2) the persons identified were: (a) the first applicant being the person speaking on the telephone, (b) the fifth applicant, Tun Ahmad Fairuz bin Dato' Sheikh Abdul Halim, being the person spoken to; (c) one Loh Mui Fah, being the man shown conversing with the
D first applicant after the telephone conversation ended; (d) other persons mentioned in the conversation being the second applicant, Tan Sri Dato' Seri Vincent Tan Chee Yioun; the third applicant, Datuk Seri Tengku Adnan Tengku Mansor; and the fourth applicant, Tun Haji Mohd Eusoff bin Chin; (3) the content of the
E conversation was true in substance and in material particulars; (4) there was sufficient evidence of misbehaviour on the part of individuals identified; and (5) there was sufficient cause to invoke the Sedition Act 1948, the Legal Profession Act 1976, the Official Secret Act 1972, the Penal Code and other laws against the
F various individuals identified.

The applicants each sought leave to apply for an order of *certiorari* to quash the whole or all relevant parts of the report. All five applications were made under O. 53 r. 3 of the Rules of the High
G Court 1980 ('RHC'). At the very initial stage of the hearing, all the parties concerned agreed and applied to court to have all five applications heard together.

The Attorney-General ('A-G') objected to the applications on the ground, *inter alia*, that what the applicants sought to quash was
H not a 'decision' within the ambit of O. 53 r. 2(4), but the collective 'findings' of the Commissioners and the applicants could not be construed as persons 'adversely affected' by the Commission's findings. The applicants in turn argued that para. 1 of the Schedule to the Courts of Judicature Act 1964 ('CJA')
I gave the court power to issue an order of *certiorari* 'for any purpose' and therefore O. 53 r. 2(4) of the RHC which purports to limit such right to a 'decision' of a public authority was *ultra vires*.

The second objection raised by the A-G was that the errors by the third to fifth applicants in wrongly citing the parties as 'respondents' coupled with the complete immunity of the Commissioners against civil suit or other proceedings was sufficient to dismiss the said applications. However this error was corrected under O. 2 r. 1 with the consent of all parties. A B

The issues before the court were: (1) the *locus standi* of the A-G; (2) whether O. 53 of the RHC is *ultra vires* para 1 of the Schedule to the 'CJA'; and (3) whether the findings of the Commission could be construed as a 'decision' for the purposes of judicial review under O. 53 r. 2(4) of the RHC. C

Held (dismissing the applications with costs):

(1) Applicants who are 'adversely affected by the decision of any public authority' as described in O. 53 r. 2(4) of the RHC are required, under O. 53 r. 3(3), to give notice of their applications to the A-G's Chambers. The notice is to enable the A-G to vet the cause papers and decide whether any 'public interest issue(s)' require the A-G's appearance at leave stage. Such appearance is as of right. From close perusal of the cause papers in all the applications, there was no doubt that public interest issues were involved and the A-G had the necessary locus to appear and to oppose the applications. *Teng Kwor Haw & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* (foll). (para 15) D E F

(2) The proviso to s. 25(2) of the CJA makes the additional powers granted under its Schedule exercisable 'in accordance with any written or rules of court relating to the same'. The words 'or for any purpose' must necessarily be taken to mean a substitution for either the words 'for enforcement of the rights conferred by Part II of the Constitution' or 'any of them' in para. 1 of the Schedule. Such exercise of such a power must therefore be in accordance with O. 53 r. 3 and r. 2(4) and that is in respect of a 'decision' and not 'findings' or 'recommendations'. (paras 22, 23 & 24) G H

(3) The Commissioners made their 'findings' based on their inquiry into the facts made available to them. Such 'findings' were not made known to the applicants directly and the making public of the report was entirely beyond the control of the Commissioners. Neither writ of *certiorari* nor prohibition lies in the case of a Commission of Enquiry and therefore there was no 'decision' made by the Commission as contemplated by I

A O. 53 r. 2(4) of the RHC. Even though all the applicants were 'adversely affected' in its natural sense by the 'findings' of the Comission, they were nevertheless not so 'adversely affected' within the context of O. 53 r. 2(4) of the RHC. *Tun Dato Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid* B *Omar & Ors* (foll). (para 31)

(4) Our courts should not import common law from other countries where the provisions of law are different and therefore the 'findings' of the Commission were not reviewable C based on the common law of other countries. There is no parallel term of 'sufficient interest' or words to similar effect in our O. 53 of the RHC as are contained in the new English O. 53 r. 3(7). As it was not the 'decision' of the Commission to make the report public, its 'findings' could not be mutated D into 'decisions' within the meaning of O. 53 of the RHC by importing and injecting the interpretation of ss. 3 and 4 of New Zealand's Judicature Amendment Act 1977 into O. 53. (paras 34 & 36)

E *[Order accordingly.]*

Case(s) referred to:

Government of Malaysia v. Lim Kit Siang & Another case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Kanawagi Superumaniam v. Dato' Abdul Hamid Mohamad [2004] 5 MLJ F *495* ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***

Re Erebus Royal Commission: Air New Zealand Ltd v. Mahon (No 2) [1981] G *1 NZLR 618* ***(refd)***

Teng Kwor Haw & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(foll)***

Tun Dato Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC ***(foll)***

H **Legislation referred to:**

Commissions of Enquiry Act 1950, ss. 2(1)(d), 3(1), 21(1)

Courts of Judicature Act 1964, s. 25(2)

Federal Constitution, art. 121

Rules of the High Court 1980, O. 2 r. 1(1), (2), O. 20 r. 5(1), (5), I O. 53 rr. 1, 2(4), 3(1), (2), (3), (6)

Judicature Amendment Act 1972 [NZ], ss. 3, 4

Judicature Amendment Act 1977 [NZ], s. 10(2)

(Application For Judicial Review No: R2-25-182-08)
For the applicant - R Thalayan (VK Lashmi with him); M/s VK Lashmi & Co
For the respondent - Puan Azizah Nawawi (Nizam Zakaria & Suzana Atan DPP's with her); AG's Chambers

(Application For Judicial Review No: R2-25-183-08)
For the applicant - LH Chua; M/s LH Chua
For the respondent - Puan Azizah Nawawi (Nizam Zakaria & Suzana Atan DPP's with her); AG's Chambers

(Application For Judicial Review No: R2-25-190-08)
For the applicant - Bastian Pius Vendargon (Dato' S Satharuban with him); M/s Satha & Co
For the respondent - Puan Azizah Nawawi (Nizam Zakaria & Suzana Atan DPP's with her); AG's Chambers

(Application For Judicial Review No: R2-25-191-08)
For the applicant - Hazman Ahmad (Abdul Aziz Hamzah with him); M/s Omar Ismail Hazman & Co
For the respondent - Puan Azizah Nawawi (Nizam Zakaria & Suzana Atan DPP's with her); AG's Chambers

(Application For Judicial Review No: R2-25-192-08)
For the applicant - Mahinder Singh Dulku (Syed Alwee Ahmad Alsree, Thomas Wong Wai Keong & Muzaffirah Ahmad Fairuz with him); M/s Firah, Wong & Cheong
For the respondent - Puan Azizah Nawawi (Nizam Zakaria & Suzana Atan DPP's with her); AG's Chambers

Watching Brief for the Bar Council - Robert Lazar (Ranjit Singh, Razlan Hazri, Mahaletchumi Balakrishnan & PL Leong with him)

Reported by Anne Khoo

JUDGMENT

Abdul Kadir Musa J:

[1] At the very initial stage of the hearing, all the parties concerned agreed and applied to court to have all the five aforesaid applications be heard together; and so ordered. The main and substantive part of their applications are for leave to apply for an order of *certiorari* to quash the whole or all relevant parts of the report dated 9 May 2008 ("the report") of the Royal

A Commission of Enquiry ("R/C"). The report is in respect of "the video clip recording of images of a person purported to be an advocate and solicitor speaking on the telephone on matters regarding the appointment of judges" which implicates all applicants in material particulars one way or other. All the said five
B applications were made under O. 53 r. 3 of the Rules of the High Court 1980 ("the 1980 Rules").

[2] The said O. 53 r. 3 states:

> (1) **No** application under this order (ie, O. 53 r. 1) shall be
C made **unless** leave therefor has been granted in accordance with this rule.
>
> (Emphasis added).

D **[3]** They must be made *ex parte* to a judge in chambers as required by O. 53 r. 3(2) by the said applicants as being the persons who are "... adversely affected by the decision of any public authority ..." spoken of by O. 53 r. 2(4) of the 1980 Rules. Such applications must be made promptly "... within 40
E days from the date when grounds for the applications first arose or when the decision is first communicated to the applicants ..." (O. 53 r. 3(6) of the 1980 Rules). Notice of such applications is required, under O. 53 r. 3(3) of the 1980 Rules, to be given to Attorney General's Chambers by the said applicants.

F **[4]** In the above context, the Hon. Attorney General, through Puan Azizah bt. Nawawi (SFC) objected to the said applications on the ground, *inter alia*, that "what" the said five applicants are seeking this court to quash is not the "decision" within the ambit of the said O. 53 r. 2(4), but the collective "findings" of the five
G commissioners appointed by Seri Paduka Baginda Yang di Pertuan Agong under ss. 2(1)(d) and 3(1) of the Commissions of Enquiry Act 1950 ("the 1950 Act") with "five Terms of Reference". For purposes of convenience, the said five Terms of Reference are:

H 1. to enquire and ascertain the authenticity of the video clip;

2. to enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation.

I 3. to enquire and ascertain the truth or otherwise of the content of the conversation in the video clip;

4. to determine whether any act of misbehavior has been committed by person or persons identified or mentioned in the video clip; and

5. to recommend any appropriate course of action to be taken against the person or persons identified or mentioned in the video clip, should such person or persons be found to have committed any misbehaviour.

As such, she submitted that they cannot be construed as being persons who are "adversely affected" by the R/C's "Findings"; all the learned counsels for all the five applicants strongly advocate otherwise.

[5] The "findings" referred to above are explained in "part 3" of the report whereby in "part 2" of the same, they are termed as the "executive summary". Thus in relation to the aforesaid five terms of reference, the R/C's "findings" are as follows:

(1) as to the 1st term of reference as to the authenticity of the material "video clip" exhibited as "exh. C7", it is authentic;

(2) as to the 2nd term of reference "the commissioners" find:

(a) that the person speaking on the phone is Dato' VK Lingam;

(b) that the person to whom he was speaking on the phone is Tun Ahmad Fairuz bin Dato' Sheikh Abdul Halim;

(c) that the Chinese man he was seen conversing with, after the phone conversation had ended, is Mr Loh Mui Fah; and

(d) that the other persons mentioned in the conversation will be identified in the body of the report;

(3) insofar as the content of the conversation in exh. C7 in respect of the 3rd term of reference, the commissioners find it to be true in substance and in material particulars;

(4) in respect of the 4th term of reference, the commissioners findings is that, there is sufficient evidence of misbehaviour on the part of certain individuals or personalities indentified in exh. C7; and

(5) they also find sufficient cause to invoke the Sedition Act 1948, the Legal Profession Act 1976, the Official Secret Act 1972 and the Penal Code against various individuals mentioned in exh. C7, without discounting that those "various individuals" may have contravened other laws in respect of the

A 5th term of reference: but leave the matter to the Hon. Attorney General, Malaysia and the Malaysian Bar Council to take appropriate actions against those so implicated.

[6] "The other persons ...", "... certain individuals or
B personalities identified in exh. C7" and ".. various individuals mentioned in exh. C7" referred to in 2(d), (4) and (5) above respectively are, *inter alia*:

(i) Tan Sri Dato' Seri Vincent Tan Chee Yioun (the 2nd
C applicant),

(ii) Datuk Seri Tengku Adnan Tengku Mansor (the 3rd applicant) and

(iii) Tun Haji Mohd Eusoff bin Chin (the 4th applicant).

D **[7]** Those aforesaid implications to all the five applicants led their respective learned counsels to strongly submit that those "findings" are affecting their respective clients "adversely", and that those "Findings" are, by their nature, justiciably reviewable by
E granting leave under O. 53 r. 3 of the 1980 Rules to all the five applicants. Fully endorsing myself with them that those "implications" have "adversely affected" all the five applicants in material particulars, the issue of whether or not necessary leave is to be granted revolves with the legal interpretation of the word
F "findings" which, in essence, is the 1st objection by the Hon Attorney General. The 2nd objection raised by the learned SFC is that, the 3rd to 5th applicants cited the "parties" as respondents wrongly.

[8] In the context above, I can justifiably conclude that, it is
G recognized and not disputed by all parties before me that the report is the "collective end product" prepared by the R/C as a whole and not by any individual of the aforesaid five commissioners. Even though the question of "bias" by the relevant commissioners as contended by the 1st applicant (in person)
H relying on the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65, cannot be ruled out, it cannot nevertheless be denied by all parties that, each of the said five Commissioners is afforded complete legal immunity against any civil suit or other
I proceedings for any act by him as a commissioner under s. 21(1) of the 1950 Act. Premised on said immunity, the said learned

SFC urged this court to dismiss all the aforesaid "defective" applications. I would have been persuasively compelled to agree with her had it not been for the presence of O. 2 r. 1 sub-rr. (1) & (2) of the 1980 Rules.

[9] The said O. 2 r. (1), *inter alia*, states:

> (1) Where, **in** the beginning ... **or at any stage, in** ... connection with any proceedings, there has ... been a failure to comply with the requirements of these rules ... in respect of ... content (ie, for example **by** naming the wrong party or parties), ... (such) failure shall be treated as an irregularity and shall **not** nullify the proceedings (which can be rectified **if** appropriate amendment is made by the relevant party or parties concerned **and** allowed **by** Court under O. 2 r. 1(2) ibid).

(emphasis added).

[10] It was with that view in mind that, at the appropriate time during the reply to such objection that I interjected asking whether:

(1) they were minded, in order to save the court's time, to apply for appropriate amendment as provided by O. 20 r. 5 sub-rr. (1) and (5) of the 1980 Rules; and

(2) if they have no objection to do so, whether or not the learned SFC has any objection to such application;

[11] In response to (2) above, I happy to note that the learned SFC categorically stated that, if those learned counsels wish to do so, she would not then persue the matter further and left the matter completely to the court's discretion. As to (1) above, all the learned counsel concerned seek a short adjournment to confer with the learned counsels for the 4th and 5th appellants and subsequently to obtain appropriate instructions from their respective clients; and so allowed by me to do so.

[12] When Dato' Bastian resumed his reply, he indicated to the court that he and his other two learned counsels for the 4th and 5th applicants, at that juncture agree to apply for the necessary amendment in line with that as cited by the 1st and 2nd applicants. The learned SFC has no objection; and so ordered. By so doing, the question of "wrong parties" being cited as pointed out above is no more an issue for me to consider; and hence it can be put to rest.

[13] The other issue that was canvassed by all the five learned counsels for their respective clients is, "what are the essential factors for the court to take into consideration" in deciding whether or not to issue the necessary leave to the applicants as applied. The settled law at this stage is:

> The Court need only determine whether or not there is a *prima facie* case in favour of the Applicants and such Applications are not made vexatiously.

The question of "*prima facie* case" as contended by the learned counsels was never raised by the learned SFC. She was also salient on the issue of "vexatiousness". That being so, I am left with the burden of determining:

(1) the question of *locus* of the Hon. Attorney General at this stage raised by En LH Chua, the learned counsel for the 2nd applicant;

(2) whether O. 53 of the 1980 Rules is *ultra vires* para. 1 of the schedule to the Courts of Judicature Act 1964 ("the 1964 Act"); and

(3) whether or not the aforesaid "findings" of the R/C can be construed as "decision" for purpose of judicial review under O. 53 r. 2(4) of the 1980 Rules.

[14] In respect of the *locus*, it was submitted by En LH Chua on the authority of *Kanawagi Superumaniam v. Dato' Abdul Hamid Mohamad* [2004] 5 MLJ 495, that I must be satisfied at leave stage that, for the Hon. Attorney General to have *locus* that "public interest issue" must be present. It must therefore be for that purpose of the "determination" by the Attorney General that:

> (3) The applicant **must** give notice of the application **for** leave not later than three days before the hearing date **to** the Attorney General's Chamber and **must** at same time lodge in those Chambers copies of the statement and affidavits.
>
> (Emphasis added)

under O. 53 r. 3(3) of the 1980 Rules.

[15] The purpose of such "notice" must be to enable the Hon. A.G. to vet the cause papers and decide whether or not there is or are "public interest issue(s)" for him or his representative to appear at leave stage. Such appearance is "as of right", and if need be, to oppose leave application at the present stage as decided in the case of *Teng Kwor Haw & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927. From close perusal of cause papers in all the applications, I have no doubt at all and conclude that "public interest issue or issues" is or are involved, and thus rule that the Hon AG, in such circumstance, has the necessary *locus* to appear and to oppose the applications at this stage.

[16] As to (2) aforesaid, O. 53 states:

> I Scope (O. 53 r. 1)
>
> (1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 **and** for the purposes therein specified.
>
> (2) This Order is subject to the provisions of Chapter V111 of Part 2 of the Specific Relief Act 1950.
>
> (Emphasis added).

[17] Rule 1(1) above speaks of "... relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 ("the 1964 Act")" referred to by s. 25(2) of the 1964 Act as "Additional Powers of High Court" in the nature of "prerogative writs".

[18] The said para. 1 states:

> 1. Power **to** issue **to** any person **or** authority directions, order or writ, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, **for** the enforcement **of** the right conferred by Part II of the Constitution, **or** any of them, or for any purpose.
>
> (Emphasis added).

[19] From the submission of Dato' Mahinder Singh Dulku, the learned counsel for the 5th applicant, since the said para. 1, is that of the Act, whilst O. 53 r. 2(4) is that of the 1980 Rules, it is his strong and unequivocal contention that anything that limits or in contravention with the said paragraph 1 is *ultra vires*, the 1964

A Act. As such, so long as the 1964 Act provides the nature of "relief sought, the court has the necessary jurisdiction to issue leave under O. 53 r. 3 of the 1980 Rules read together with para. 1 of the 1964 Act to enable his client and the other four applicants to seek appropriate order of *certiorari*. He relied his
B contention on the words "for any purpose" present in the said para. 1, which include the aforesaid "findings" of the R/C. His view is being adopted by other applicants' learned counsels.

[20] That being so, I am therefore compelled to dissect the said
C para. 1 ("para 1") and its inter-reaction with the relevant rules of O. 53 of the 1980 Rules, without getting deeply involved into the "academics" of the English Language.

[21] Section 25(2) of the 1964 Act gives the High Court
D additional powers set out in the Schedule, in addition to those general powers under art. 121 of the Federal Constitution ("the Constitution"). However, by the proviso to the said s. 25(2), it provides that, "... all such powers shall be exercised in accordance with any written or rules of court relating to the same.". The
E "rules of court ..." mentioned thereto in relation to all the present five applications must therefore be "O. 53 r. 3 and r. 2(4)" of the 1980 Rules. Thus, no such power specified in para. 1 can be exercised by court as its "additional power" in contravention to the aforesaid rules of O. 53.

F **[22]** The "additional powers" referred to by s. 25(2) of the 1964 Act can be properly exercised in one or more ways as demonstrated below.

(1) The court can so exercise its "additional power" "... to issue
G to any person ... directions ... for the enforcement of the rights conferred by part II of (the constitution) ....."; or

(2) Instead of issuing "directions" as in (1), the court can "... issue to any person ... orders ... for the enforcement of rights
H (as (1) above) ... ."; or

(3) Issuing writs for similar purposes as in (1) or (2) above. This includes writs of the nature of *habeas corpus* and or *mandamus* and or prohibition and or *quo warranto* and or *certiorari*; or

I (4) Instead of "to any person", the court can exercise similar powers as (1) - (3) above "... to any ... authority ...".

[23] The words " ... or any of them," found immediately after the words "... rights conferred by Part II of the Constitution," must have meant to be "any" of those constitutional rights specified by the aforesaid Part II.

[24] Lastly, the words "... or for any purpose." in the light of para. 1 must necessarily be taken to mean as a substitution to either " ... for enforcement of the rights conferred by part II of the constitution," or "... any of them (as explained earlier) ...". Such exercise of such a power must therefore be in accordance with O. 53 r. 3 and r. 2(4); and that is in respect of a "decision" and not "findings" or "recommendation".

[25] On the premises above, I conclude that the aforesaid section s. 25(2) is not in any way in conflict with O. 53 r. 3 as advocated by the 5th applicant's counsel.

[26] Lastly, reverting back to the issue of whether or not the aforesaid "findings" of the R/C are "decisions" within the ambit of O. 53 r. 2(4) of the 1980 Rule, I have no alternative but to unwind the chronology of events that gave birth to those "findings". It all started on or about September, 2007.

[27] On or about the said period, the former Deputy Prime Minister, Dato' Seri Anwar Ibrahim together with several members of Parti Keadilan Rakyat held a press conference and released to the media a Video Clip recording of approximately eight minutes purportedly showing the 1st applicant speaking on the telephone to someone whom Dato' Seri Anwar Ibrahim alleges to be the 5th applicant. That Video Clip was produced in the enquiry and marked by the R/C as exh. C7. Subsequent to that event, investigation were taken by the Anti Corruption Agency.

[28] Later, on 17 November 2007, the Government announced the setting up of the R/C "to investigate exh. C7 which was established on 12 December 2007 pursuant to s. 2 of the 1950 Act. The five commissioners were:

(1) Tan Sri Dato' Seri Haidar bin Mohamad Noor, as chairman;

(2) Tan Sri Datuk Amar Steve Shim Lip Kiong;

(3) Dato' Mahadev Shanker;

(4) Puan Sri Datuk Zaitun Zawiyah binti Puteh; and

(5) Dato' Khoo Kay Kim.

[29] They were entrusted with five terms of reference as mentioned earlier above pursuant to s. 3 of the 1950 Act.

[30] The said R/C commenced its enquiry by way of a public hearing on 14 January 2008. It was concluded on 15 February 2008. The R/C submitted its report to the Yang Di Pertuan Agong on 9 May 2008. Later, that said report ("the report") was transmitted to the Government who decided to make it available to the public as from 20 May 2008. It is to be noted that, until 19 May 2008, nothing was known about the aforesaid "findings" of the R/C as contained in the report. None of the said five commissioners ever made known their said "findings" either to any or all the said five applicants or to the public. They only conveyed their said "findings" in the report by submitting the said report to the Yang Di Pertuan Agong.

[31] From the above analysis, I am crystally clear that there is no "decision" ever made by the R/C as contemplated by O. 53 r. 2(4) of the 1980 Rules. The Commissioners made their "findings" based on their inquiry into the facts made available to them. Such "findings" was never ever made known to any of the five applicants between the period of 14 January 2008 and 19 May 2008. Whatever happened after that period, especially as from the 9 May 2008 (the date the report was submitted to the Yang Di Pertuan Agong) is entirely beyond the control of those Commissioners. Thus *Tun Dato Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294, it was held that, neitherwrit of *certiorari* or prohibition lie in the case of commission of inquiry; and R/C is in that position.

[32] Be that as it may, all the applicants relied on New Zealand case of *Re Erebus Royal Commission: Air New Zealand Ltd v. Mahon (No 2)* [1981] 1 NZLR 618 to urge the court to accept their proposition that the "findings" of the R/C is reviewable by this court. In that case, ss. 3 and 4 of the New Zealand's Judicature Amendment Act 1972 ("the 1972 Act") were applied by the court.

[33] Under s. 3 of the 1972 Act, "application for review" means an application under s. 4(1) of the said Act which include "... purported exercise by any person of a statutory power". By the said s. 3, "decision" includes a "determination" or "order", and by the same section "statutory power of decision" means a power or

right conferred by or under any Act " ... to make a decision ...". "Statutory power" includes powers "to make any investigation or inquiry into the rights, ... or liabilities of any person." by virtue of further amendments by s. 10(2) of Judicature Amendment Act 1977 (1977 No. 32) as from 7 October 1977. However, parallel provision is not available in our O. 53 of the 1980 Rules to deal with situations similar as discussed in the said *Re Erebus Royal Commission's* case. Even though the principles of the said case were referred to in the aforesaid *Tun Dato' Hj Mohamed Salleh Abas's* case, it was not followed by our Supreme Court.

[34] Our court should not import common law from other countries where the provisions of our laws are different as decided in the case of *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573 (Federal Court, Rayuan Sivil No. 01-8-2007 (W)). Thus in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63, the distinction between Malaysian and common law was also recognized by our then Supreme Court. That being so, I cannot agree with the proposition that, the "findings" of the aforesaid R/C are reviewable based on common law of other countries are applicable in Malaysia. The fact that there is no parallel term "sufficient interest" or words to similar effect as contained in the new English O. 53 r. 3(7) in our O. 53, judicially justifies "as to why" the other countries' common law is not applicable in Malaysia.

[35] Lastly, for the reasons discussed above the aforesaid "findings" of the R/C remain to be the "findings" and not or should not be construed as "decisions" within the ambit of O. 53 r. 2(4) of the 1980 Rules. Applying the law of common sense, I have no hesitation to conclude that a "decision" may or may not include and or based on any of the aforesaid "Finding" or "Findings" of the R/C, but any of such "findings" is, certainly not a "decision" in its natural meaning or within the ambit of the said O. 53 r. 2(4).

[36] In the present case, it cannot be disputed that it was not the "decision" of the R/C to make the Report Public. Thus its "findings" can never be mutated to be "decisions" within the meaning of our O. 53 of the 1980 Rules by importing and injecting the interpretation of ss. 3 and 4 of the New Zealand's Judicature

A Amendment Act 1977 into our said O. 53. If at all it should be so interpreted, there must first be metamorphosis and not mutation of Malaysia Acts within our judicial landscape; but not otherwise.

[37] Platformed on the above reasoned analysis, I hereby allow
B the learned SFC's preliminary objection as to the microscopic distinction between the "decisions" spoken of by O. 53 r. 2(4) of the 1980 Rules and the aforesaid "findings" of the R/C which, I firmly hold that, they cannot be construed to be within the contemplation of the said sub-r. (4). Even though it cannot be
C denied that all the five applicants are "adversely affected" in its natural sense by those "findings" of the R/C, they are nevertheless not so "adversely affected" within the context of O. 53 r. 2(4) of the 1980 Rules. That being so, I have to hereby refuse leave to all the five applicants and dismiss all their applications with costs.

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